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No. 14-1415

In the Supreme Court of the United States

FOUNDRY DIVISION OF ALCON INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit affirmed the National Labor Relations Board's (Board) refusal to overturn a representation election where voters were subjected to racially demeaning and inflammatory language, including the use of the word "nigger" while in line to vote. The Sixth Circuit's decision affirms the Board's complete disregard for other relevant bodies of law involving employment relations and creates two disparate bodies of law on the effect of racial invective in the workplace.

The questions presented, therefore, are:

1) Whether the Sixth Circuit's decision permits the Board to disregard clear precedent by this Court which implores federal agencies to heed other equally important statutory schemes in exercising its authority;

2) Whether the Board, by disregarding prior rulings by this Court, various Circuit Courts of Appeals and intent of Title VII, all of which categorically declare the odious nature of the word "nigger," creates inconsistent and contradictory bodies of law governing the workplace.

Rule 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent companies or wholly owned subsidiaries.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 5

I. THE SIXTH CIRCUIT'S DECISION DISREGARDS AND IS IN DIRECT CONFLICT WITH EXPLICIT PRIOR U.S. SUPREME COURT PRECEDENT 6

A. The Sixth Circuit's Opinion Is In Direct Conflict With This Court's Direction In *Southern Steamship* That It Must Consider Other Areas Of The Law In Resolving The Effect Of Racial Epithets In A Union Election 6

B. The Sixth Circuit's Failure To Consider The Law Developed Under A Related Statutory Scheme Is Also In Conflict With The Decisions Of Various Courts Of Appeal 10

II. THE SIXTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH LAW DEVELOPED UNDER TITLE VII REGARDING THE EFFECT OF RACIAL EPITHETS IN THE WORKPLACE 11

A. The Effect Of The Use Of The Word "Nigger" Under The Anti-Discrimination Laws 12

B. The Sixth Circuit's Interpretation Of The Effect Of The Use Of The Word "Nigger" During A Representation Election 16

CONCLUSION 23

APPENDIX

Appendix A
Sixth Circuit Opinion and Judgment - 08/09/01 . . . . . 1a

Appendix B
Sixth Circuit Order - 12/21/01 . . . . . 16a

Appendix C
Decision of NLRB - 07/08/99 . . . . . 18a

Appendix D
NLRB Supplemental Decision - 09/16/98 . . . . 27a

Appendix E
Hearing Officer's Report on Objections - 06/24/98 . . . . . 30a

Appendix F
Decision and Order Directing Hearing - 04/15/98 . . . . . 49a

TABLE OF AUTHORITIES

Page

Cases

ABF Freight Sys., Inc. v. NLRB,
510 U.S. 317 (1994) 9

Bailey v. Binyon,
583 F. Supp. 923 (N.D. Ill. 1984) 13

Bibb Mfg. Co.,
82 NLRB 338 (1949) 18

Bibbs v. Block,
778 F.2d 1318 (8th Cir. 1985) (*en banc*) 14

Brewer v. Muscle Shoals Board of Education,
790 F.2d 1515 (11th Cir. 1986) 14

Brown v. East Mississippi Electric Power Assoc.,
989 F.2d 858 (5th Cir. 1993) 13

Burlington Truck Lines v. United States,
371 U.S. 156 (1963) 8

Carter v. Chrysler Corp.,
173 F.3d 693 (8th Cir. 1999) 14

Cross Baking Co. v. NLRB,
453 F.2d 1346 (1st Cir. 1971) 21

Diamond State Poultry Co.,
107 NLRB 3 (1953) 21

Dowd v. United Steelworkers of American, Local No. 286,
253 F.3d 1093 (8th Cir. 2001) 14

EEOC v. Alton Packaging Corp.,
91 F.2d 920 (11th Cir. 1990) 14

Empire Mfg. Corp.,
120 NLRB 1300 (1958) 18

Equal Employment Op. Com'n v. American Tel. & Tel. Co.,
365 F. Supp. 1105 (E.D. Penn. 1973), *aff'd*, 506 F.2d 735
(3rd Cir. 1974) 10

General Shoe Corp.,
77 NLRB 124 (1948) 17, 23

Hoffman Plastics Compounds, Inc, v. NLRB,
208 F.3d 229 (D.C. Cir. 2000), *cert. granted*,
122 S. Ct. 23 (2001) (No. 00-1595) 8, 9

Jackson v. Quanex Corp.,
191 F.3d 647 (6th Cir. 1999) 15

Kendall v. Block,
821 F.2d 1142 (5th Cir. 1987) 14

Laborers' Int'l Union, Local 478 v. NLRB,
503 F.2d 192 (D.C. Cir. 1974) 10

McKnight v. General Motors Corp.,
908 F.2d 104 (7th Cir. 1990) 13

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 12, 13

Monteiro v. The Temple Union High School District,
158 F.3d 1022 (9th Cir. 1998) 13

NLRB v. Eurodrive, Inc.,
724 F.2d 556 (6th Cir. 1984) 20

NLRB v. Foundry Div. of Alcon Industries,
260 F.3d 631 (citing *Sewell,* 238 NLRB at 66-68) . 18, 22

New York Shipping Ass'n v. Federal Maritime Comm'n,
854 F.2d 1338 (D.C. Cir. 1988) 7, 8, 9

P. D. Gwaltney, Jr., & Co.,
74 NLRB 371 (1947) 18

Petroleum Carrier Corp.,
126 NLRB 1031 (1958) 18

Sewell Mfg. Co.,
138 NLRB 66 (1962) 18, 19, 20

Sharnay Hosiery Mills,
120 NLRB 750 (1958) 18

Southern Steamship Co. v. NLRB,
316 U.S. 31 (1942) 6, 7, 8, 9, 11

Sure-Tan v. NLRB,
467 U.S. 883 (1984) 7

YKK (USA) Inc.,
269 NLRB 82 (1984) 18

Zeiglers Refuse Collectors, Inc. v. NLRB,
639 F.2d 1000 (3rd Cir. 1981) 21

Others

National Labor Relations Act,
29 U.S.C. § 158(a) 3

NLRB Handbook–Interference with Elections,
24-323 (Racial Appeals) 18

THE GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT (1997) 9

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e . . . . . passim

PETITION FOR A WRIT OF CERTIORARI

Petitioner Foundry Division of Alcon Industries, Inc., respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 260 F.3d 631 and is reproduced as Appendix A at p. 1a. The Sixth Circuit's Order denying Alcon's Petition for Rehearing En Banc is reproduced as Appendix B at p. 16a. The July 8, 1999 Decision and Order of the National Labor Relations Board (hereinafter "NLRB" or "Board") finding that Alcon had failed to bargain is reported at 328 NLRB No. 128 and is reproduced as Appendix C at p. 18a. The September 16, 1998 Supplemental Decision and Certification of Representative of the NLRB rejecting Alcon's objections to the Hearing Officer's Recommendations regarding the objections to the election is unreported and is reproduced as Appendix D at p. 27a. The June 24, 1998 Hearing Officer's Report on Objections is unreported and is reproduced at Appendix E at p. 31a. The April 15, 1998 Decision and Order Directing Hearing on Alcon's Objections to the Election is unreported and is reproduced at Appendix F at p. 49a.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2001. Petitioner filed a timely petition for rehearing en banc, which was denied by the Sixth Circuit on December 21, 2001. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq* ,states in relevant part:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 9 of National Labor Relations Act, as amended, 29 U.S.C § 159 *et seq.*, states in pertinent part:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of

employment, or other conditions of employment. . . ."

Section 8 of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a), states in pertinent part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157]; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. § 159(a)]."

STATEMENT OF THE CASE

This case arises out of a union representation election at Petitioner Foundry Division of Alcon Industries, Inc. (hereinafter "Alcon" or "Company"). On May 22, 1997, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW" or "the Union") filed a representation petition with the NLRB seeking certification as the collective bargaining representative of production and maintenance employees at Alcon. Thirty-six votes were cast for the Union and thirty-two were cast against the Union. Three ballots were challenged.

During the course of the balloting in the polling area Union agents and/or supporters engaged in a course of misconduct which included hurling racially insulting language and making threats towards other employees in an attempt to

coerce their support and votes. Most significantly, voters encountered racial slurs and epithets as they waited in line to vote before and during the polling in the instant election.

Specifically, one African-American employee Enrico Knight testified that he was the second or third person in line to vote and that while he was in line another employee, Ervin Wilson, also African-American, who was standing approximately ten persons behind him in line, yelled to him, "Niger [sic], Shorty, I know you're gonna [sic] vote yes." He said that in the voting line people were saying things like "Niger [sic], bitch, whore, all that." He said he could not recall who said these things, "The line was so long, you know, I hear it and I don't hear it, I'm use to hearing it every day from them." Knight said that African-Americans at the Company often used the word "nigger" toward one another.

The Company filed objections to conduct affecting the results of the election. The Regional Director of the NLRB issued a report recommending that the Board overrule the Company's objections. The Company filed Exceptions to the Regional Director's report, and the NLRB issued a decision and order directing the Regional Director to conduct a hearing regarding the Company's objections.

A Hearing Officer held a two-day hearing and issued a report recommending that the objections be overruled and that a Certification of Representative issue in favor of the Union. Again, the Company filed Exceptions. A three-member panel of the Board issued a Supplemental Decision and Certification of Representative, adopting the hearing officer's findings and recommendations. The Board agreed with the Hearing Officer that the employees' use of racial epithets as they were waiting in line to vote was not sufficient to overturn the election.

After the Board processes were exhausted, the Union requested to bargain collectively with Alcon who declined on the grounds the Union was not properly certified. On July 9, 1999, the Board issued a Decision and Order, 328 NLRB No. 129, finding Alcon refused to bargain with the Union in violation of § 8(a)(1) and (5) of the National Labor Relations Act. On January 13, 2000, the Board filed an Application for Enforcement of its Bargaining Order with the Sixth Circuit. The Sixth Circuit issued an Opinion on August 9, 2001, granting the Board's Application for Enforcement. The Sixth Circuit denied Alcon's Petition for Rehearing En banc on December 21, 2001.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision has effectively created two disparate bodies of law on the effect of racial epithets in the workplace – Title VII's strict standard that racial epithets cause intolerable working conditions and the NLRA's standard that racial epithets hurled at the time of a union representation election are so innocuous that it does not alter the "laboratory conditions" of a union representation election. The Sixth Circuit's decision is in direct conflict with not only previous decisions by this Court, but also is blatantly contrary to the decision of various Courts of Appeal regarding the effect of racial epithets in the workplace.

I. THE SIXTH CIRCUIT'S DECISION DISREGARDS AND IS IN DIRECT CONFLICT WITH EXPLICIT PRIOR U.S. SUPREME COURT PRECEDENT

A. The Sixth Circuit's Opinion Is In Direct Conflict With This Court's Direction In *Southern Steamship* That It Must Consider Other Areas Of The Law In Resolving The Effect Of Racial Epithets In A Union Election.

The decision below creates an unmistakable conflict with not only this Court's prior ruling in *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942). The Sixth Circuit and the NLRB ignored and failed to acknowledge the importance of other statutory schemes that govern the workplace.

This Court has unequivocally declared that in enforcing the NLRA, the Board may not "ignore other and equally important Congressional objectives." *Southern Steamship,* 316 U.S. at 47. This Court went on to explain:

> Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. *Id.*

If conflict requires the Board "to accommodate the policies of another statutory regime within the framework of the legislation it administers," it "must fully enforce the requirements of its own statute, but must do so, insofar as

possible, in a manner the minimizes the impact of its actions on the policies of the other statute." *New York Shipping Ass'n v. Federal Maritime Comm'n,* 854 F.2d 1338, 1370 (D.C. Cir. 1988).

> [A]n agency, faced with alternative methods of effectuating the policies of the statute it administers, (1) must engage in a careful analysis of the possible effects those alternative courses of action may have on the functioning and policies of the other statutory regimes, with which a conflict is claimed; (2) must explain why the action taken minimizes, to the extent possible, its intrusion into policies that are more properly the province of another agency or statutory regime.

Id.

In *Southern Steamship* the union received the majority of the votes, and the National Maritime Union was then certified. After the employer refused to bargain, several of the men went on strike and were subsequently terminated by the company. This Court held that the Board's remedial order of back pay and reinstatement for striking seamen was unenforceable because it conflicted with another statute prohibiting strikes or mutinies by seamen by encouraging these prohibited acts. This Court found basic maritime law must be accommodated and accorded due deference and respect in the situation where a strike (guided by labor laws) conflicts with basic maritime law.

In *Sure-Tan v. NLRB,* 467 U.S. 883 (1984), the interplay of the Immigration and Naturalization Act ("INA") and the NLRA was considered. This Court held that the court

of appeals and the Board erred by not conditioning its back pay award on the employee's availability for employment in the United States under the Immigration and Nationality Act.

The Court held, that in fashioning its award, the Board is required to consider other equally important Congressional objectives. "By conditioning . . . reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing back pay, the employees must be deemed 'unavailable' for work . . . during any period when they were not lawfully entitled to be present and employed in the United States." 467 U.S. at 903. *See also Burlington Truck Lines v. United States*, 371 U.S. 156, 172-74 (1963) ("the Commission must take care not to create tension between the labor and shipping law obligations of carriers.")

This Court has very recently recognized the importance of the issue presented here by granting certiorari in *Hoffman Plastics Compounds, Inc, v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001) (No. 00-1595). In *Hoffman*, this Court has considered a question similar to the one that is presented here – what a court should do when faced with dueling statutory schemes.

In *Hoffman*, at fundamental odds were an NLRB order and immigration law. The employer had illegally fired several workers in retaliation for attempting to organize a union. However, one of these employees was an undocumented alien. The Board, therefore, denied him reinstatement and stopped his back pay as of the date of discovery of his status. The employer appealed the board decision asking for all back pay to be denied to the illegal alien. The court of appeals, relying heavily on this Court's decision in *Southern Steamship* and the DC Circuit opinion in *New York Shipping Ass'n v.*

Federal Maritime Comm'n, 854 F.2d 1338 (D.C. Cir. 1988), held that the court in deciding its case must pay heed to basic immigration law in the course of interpreting and applying basic labor law.

This case involves the interplay between the National Labor Relations Act ("NLRA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The NLRA was enacted in 1935 to encourage collective bargaining, the promotion of industrial peace, and, most importantly, the protection of a worker's rights of association, organization, and representation. *Hoffman,* 208 F.3d at 231. *See also* THE GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT (1997). Like the NLRA, the nation's anti-discrimination laws, most notably in the law of Title VII, 42 U.S.C. § 2000e-2(a) (2001), safeguards workers' employment conditions.[1] Specifically, Title VII prohibits employment discrimination on the basis of, *inter alia,* race.

In sum, the principal dispute between the parties concerns the extent to which the Board is required to take racial discrimination laws and standards into account in determining the outcome of a contested representation election. The Sixth Circuit and the Board failed to follow this Court's guidance in *Southern Steamship.* This failure has resulted in the fashioning of a rule of law regarding the effect

[1] While the Board's formulation of remedies for NLRA violations merits the highest level of deference, *see ABF Freight Sys., Inc. v. NLRB,* 510 U.S. 317, 324 (1994), its interpretation of Title VII and other discrimination laws, ***or lack thereof,*** warrants no deference at all. (Emphasis added.) *See, e.g., New York Shipping Ass'n* 854 F.2d at 1365 (agency interpretation of a statute that it does not administer is entitled to no deference).

of racial epithets in the workplace that is contrary to how the same question has been answered in the context of Title VII.

B. The Sixth Circuit's Failure To Consider The Law Developed Under A Related Statutory Scheme Is Also In Conflict With The Decisions Of Various Courts Of Appeal.

The failure of the Board and the Sixth Circuit to consider the law developed under Title VII regarding the effect of racial epithets in the workplace is also in direct conflict with the decisions of various Courts of Appeals. For example, in *Laborers' Int'l Union, Local 478 v. NLRB*, 503 F.2d 192, 194 (D.C. Cir. 1974), the court expressly instructed the Board not to ignore Title VII in considering whether the union had a right to demand reappointment of a specific supervisor, which the Board had considered an unfair labor practice.

In *Equal Employment Op. Com'n v. American Tel. & Tel. Co.*, 365 F. Supp. 1105 (E.D. Penn. 1973), *aff'd*, 506 F.2d 735 (3rd Cir. 1974), the court, in the context of trying to hammer out the remaining parts of a very large civil rights settlement involving numerous governmental and private parties, as well as several unions, held:

> The long-standing federal interest in maintaining and promoting aggressive collective bargaining as a means of achieving the eradication of unfair labor conditions must be measured against and reconciled with equally valid, countervailing federal objectives. One such competing federal policy which significance is as paramount as that of collective bargaining is embodied in legislation

> enacted to extirpate from society invidious, discriminatory employment practices and to accord to every person the equal opportunity to secure job positions commensurate with his or her abilities. [Citations omitted.]

Equal Employment Op. Com'n, 365 F. Supp. at 1129-30.

Congress in passing Title VII has conclusively set certain minimum standards for the workplace, whether it be in the labor or employment context. The decision of the Sixth Circuit and the Board undermines Title VII and related discrimination statutes. As fully set forth *infra* the Sixth Circuit's refusal to follow *Southern Steamship* and the holdings of other Courts of Appeal that require it to consider other analogous bodies of law has created an irreconcilable conflict between the treatment of racial epithets in Title VII cases and the treatment of racial epithets under the NLRA.

II. THE SIXTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE LAW DEVELOPED UNDER TITLE VII REGARDING THE EFFECT OF RACIAL EPITHETS IN THE WORKPLACE.

The Board and the Sixth Circuit failed to give proper consideration to a similar statutory scheme that governs workplace conduct—Title VII of the Civil Rights Act of 1964[2]. *See Southern Steamship*, 316 U.S. 31. The use of the unquestionably offensive term "nigger" cannot be any treated

[2] And, notably, it is not at all clear that *any* consideration was given to Title VII or other discrimination laws by either the court or Board, despite the fact that it was comprehensively briefed by Petitioner.

differently in the context of what affects working conditions under Title VII than it is in the context of determining the effect on an employee while waiting in line to vote in a union election under the NLRA. The word "nigger" should be intolerable in any and every context.

The Circuit Courts of Appeal unanimously have held that use of racial epithets alter the terms and conditions of employment under Title VII. The Board and the Sixth Circuit must not be permitted to declare the word "nigger" fundamentally wrong but nonetheless permissible under the NLRA. This decision creates a fundamental and immediate conflict between two inextricably intertwined bodies of law governing the workplace. Petitioner respectfully requests this Court to grant this Petition to resolve these conflicts.

A. The Effect Of The Use Of The Word "Nigger" Under The Anti-Discrimination Laws

Title VII makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e. It protects employees from hostile work environments created on account of the employees' race, color, national origin, sex or religion. *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57 (1986). Ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race/color constitute unlawful harassment where the conduct creates an intimidating, hostile, or offensive

working environment, or interferes with the individual's work performance. *Meritor Sav. Bank, FSB,* 477 U.S. at 60.[3]

Courts of Appeal have unanimously and unequivocally determined that the use of the term "nigger" is the most demeaning and degrading word that can be uttered toward an African-American and have emphasized the severe effect that the use of that word has on the working conditions of those who are subject to its use. *See Monteiro v. The Temple Union High School District,* 158 F.3d 1022, 1030 n.12 (9th Cir. 1998) ("We recognize that the term "nigger," as applied to blacks, is uniquely provocative and demeaning and that there is probably no word or phrase that could be directed at any other group that could cause comparable injury."); *McKnight v. General Motors Corp.*, 908 F.2d 104, 114 (7th Cir. 1990) ("Offense aside, the use of the word even in jest could be evidence of racial antipathy."); *Bailey v. Binyon,* 583 F. Supp. 923, 927 (N.D. Ill. 1984) ("The use of the word "nigger" automatically separates the person addressed from every non-black person; this is discrimination per se.")

For example, in *Brown v. East Mississippi Electric Power Assoc.*, 989 F.2d 858, 861 (5th Cir. 1993), the plaintiff's supervisor routinely used the term "nigger" in reference to African-American employees. The court found:

> Unlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term "nigger" is a universally recognized opprobrium, stigmatizing African- Americans because of their race. That Pippin [the supervisor] was

[3] Similarly, other civil rights laws also proscribe racial harassment. *See, e.g.*, 42 U.S.C §§ 1981, 1982, 1983, 1985(3).

> usually circumspect in using the term in the presence of African-Americans underscores that he knew it was insulting. Nonetheless, he persisted in demeaning African-Americans by using it among whites. This is racism." (Internal citations omitted.)

In the case of *Dowd v. United Steelworkers of American, Local No. 286*, 253 F.3d 1093 (8th Cir. 2001), the Court upheld a judgment against a union for racial harassment pursuant to Title VII and 42 U.S.C. § 1981. The Court found that the union strikers routine use of the term "nigger" towards African-Americans who crossed the picket lines was sufficient to create a hostile work environment. *See also Carter v. Chrysler Corp.*, 173 F.3d 693, 701 (8th Cir. 1999) (stating "racial epithets are often the basis for racial harassment claims...and may likewise create an inference that racial animus motivated other conduct as well.").

Federal Courts have also determined that the use of the term "nigger" can constitute direct evidence of discriminatory animus by an employer. *See Kendall v. Block*, 821 F.2d 1142, 1145 (5th Cir. 1987) (referring to an employee as a "nigger" may be direct evidence of discrimination); *EEOC v. Alton Packaging Corp.*, 91 F.2d 920, 923 (11th Cir. 1990) (a general statement by the manager that if it was his company he would not hire blacks is considered direct evidence of discriminatory animus); *Brewer v. Muscle Shoals Board of Education*, 790 F.2d 1515, 1518 (11th Cir. 1986) (a comment by the school's superintendent that he did not want the system "nigger rigged" is direct evidence of discriminatory animus); *Bibbs v. Block*, 778 F.2d 1318, 1320 (8th Cir. 1985) (*en banc*) (a selection committee member's characterization of plaintiff as a "black militant" and reference to another

black employee as "nigger" was direct evidence of discrimination in a failure to promote case).

Federal Courts have also uniformly rejected the notion under Title VII, that the more frequently the word is used in the workplace, the less effect it has on those who are subjected to it. The Sixth Circuit's decision in *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999), articulately summarized the absurdity of this contention by rejecting what it characterized as:

> [T]he most disturbing judgment in this case: the District Court's decision to minimize proof of persistent racial slurs and graffiti at Quanex as "conventional conditions on the factory floor, sometime described as conduct which is merely offensive... .
>
> [T]he District Court was patently wrong to condone continuing racial slurs and graffiti on the grounds that they occurred in a blue-collar environment. . . . We have deemed such reasoning illogical in the context of sexual harassment, "because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex based conduct is sufficiently severe or pervasive to constitute a hostile work environment." We have likewise rejected the view that racial slurs and graffiti that are "part of the everyday banter on the shop floor" cannot constitute racial harassment, finding that evidence that regular incidents of graffiti and racial slurs may instead support a jury finding that a work

> environment was racially hostile because the conduct was not isolated, and the employer knew of it and did little to correct the problem. In accordance with these cases, ***we squarely denounce the notion that the increasing regularity of racial slurs and graffiti render such conduct acceptable, normal, or part of "conventional conditions on the factory floor."***

Id. at 662 (Emphasis added.) (Internal citations omitted.)

What these Title VII cases demonstrate is that the use of the word "nigger" in the workplace alters the working conditions of employees who are subjected to its use. Courts have uniformly affirmed the basic right of an employee to be free of a racially discriminatory atmosphere.

As is more fully set forth *infra*, the Sixth Circuit and the Board in this matter permitted the repeated use of the term "nigger," as part of a request for support of the union during the most sacrosanct time for an employee, while waiting in line to vote in a union election. Directly contrary to Title VII, the Sixth Circuit and the Board diminished the effect of those words based upon the alleged frequency with which they were uttered.

B. The Sixth Circuit's Interpretation Of The Effect Of The Use Of The Word "Nigger" During A Representation Election

The NLRB conducts elections in accordance with very strict standards designed to give the voters an opportunity to freely indicate whether or not they wish to be represented by a union for the purposes of collective bargaining. The

standard under which elections are to be evaluated is set forth in the seminal case of *General Shoe Corp.*, 77 NLRB 124 (1948).

The *General Shoe* doctrine holds that conduct which creates an atmosphere that renders improbable a free choice will warrant invalidating the election even though that conduct may not constitute an unfair labor practice. According to the *General Shoe* doctrine an election will be set aside where "an atmosphere calculated to prevent a free and untrammeled choice by employees" is present. *General Shoe* at 127.

The Board in *General Shoe* summarized the doctrine as follows:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, on the conditions as nearly ideal as possible, to determine the uninhibited desires of employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in rare extreme cases, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe, 77 NLRB at 127 (Internal citations omitted.)

The standard that the Board requires in an election where racial animosity and prejudice is present is also quite clear: "Campaign propaganda calculated to inflame racial prejudice of employees, deliberately seeking to overemphasize

and exacerbate racial feeling by irrelevant, inflammatory appeals, is a basis for setting aside an election." *NLRB Handbook–Inference with Elections*, 24-323 (Racial Appeals). *See also Sewell Mfg. Co.*, 138 NLRB 66 (1962); *YKK (USA) Inc.*, 269 NLRB 82 (1984). For further background, see *P. D. Gwaltney, Jr., & Co.*, 74 NLRB 371 (1947); *Bibb Mfg. Co.*, 82 NLRB 338 (1949); *Empire Mfg. Corp.*, 120 NLRB 1300, 1317 (1958); *Petroleum Carrier Corp.*, 126 NLRB 1031 (1958); cf. *Sharnay Hosiery Mills*, 120 NLRB 750 (1958).

As Judge Jones cogently explained in the underlying case at bar,

> The seminal case in the area of race and union elections is *Sewell Manufacturing Co.*, 138 NLRB 66 (1962). In that case, during a representation election at plants in Georgia, the employer distributed to its employees various items relating to race including a picture of a white woman dancing with a black man, a picture of a black woman dancing with a white man identified as a union leader, and articles and letters stating that the union donated money to the National Association for the Advancement of Colored People and the Congress of Racial Equality, including a letter explaining that the president of the employer company would vote against the union because of its contributions to these organizations

NLRB v. Foundry Div. of Alcon Industries, 260 F.3d 631, 633-634 (citing *Sewell*, 238 NLRB at 66-68)

The Board recognized in *Sewell* that its function is

> to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

Id. at 70.

Herein, the Sixth Circuit explained that the principal focus of the decision in *Sewell* is whether the remark or act appealed to racial prejudice which could thereby prevent a reasoned choice. 260 F.3d at 634.

The *Sewell* Board further explained:

> We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.
>
> What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible

> a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.

Id. at 71.

Each circuit has applied *Sewell*, in their own particular way, over the years, enforcing an absolute intolerance for appeals to racial animosity in order to preserve the "laboratory conditions" of a representation election. For example, in *NLRB v. Eurodrive, Inc.*, a union representative told white employees prior to the election that unlike the only black employee the white employees needed the union to protect their jobs. 724 F.2d 556, 557 (6th Cir. 1984). The representative cited as an example a situation involving a white employee who had recently been fired for racial harassment and insisted that the union would get him rehired. *Id.* at 559. The Court considered it necessary to view the statements in the context of the racial tension already existing at the time the alleged statements were made and ultimately refused to enforce the Board's bargaining order. *Id.* at 559, 560. The Court held that the union representative had engaged in a "deliberate attempt to exacerbate racial feelings among the employees prior to the election" and that, under the factual circumstances surrounding the conduct, this "was likely to have had an appreciable affect upon the employees' freedom of choice." *Id.* at 560.

The Board and the Courts of Appeal have generally emphasized that what is important in a review of election objections is the existence of a coercive atmosphere, regardless of its origins. A coercive atmosphere is the critical determining factor. There must be free and fair elections.

Diamond State Poultry Co., 107 NLRB 3, 6 (1953); *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1348 (1st Cir. 1971); *Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1004. (3rd Cir. 1981).

At this particular election at least thirty to forty employees were subjected to a series of racial insults and profanity while waiting in line to vote in the election, negating the requisite laboratory conditions. As described above, while waiting in line to vote employee Knight was called a "nigger," recognized as the most racially demeaning, degrading, and offensive term known to Americans. The use of the word "nigger" is so disparaging that it strips the listener of dignity and attempts to place the listener in a position of inferiority. Here, the term "nigger" was used in the same sentence as a request (arguably a threat, implied or understood) for a vote in favor of the Union.

One employee testified that other employees were hurling the same term, and other profanity such as "bitch" and "whore" at others while employees waited in line to vote. Approximately thirty to forty voters were standing in close proximity to the voting room in a line approximately fifteen to twenty feet long. Due to the close proximity of these people, they undoubtedly were subjected to the same venomous language as Knight. The atmosphere created in the voting line at Petitioner was significantly more disturbing than conditions that have previously justified overturning an election. This sort of conduct clearly abrogates the requisite laboratory conditions.

The Courts of Appeal have said that the repeated use of the word "nigger," as part of a request for a vote is permissible in a union election and does not taint the laboratory conditions necessary for the election. The Court

and the Board made absolutely no attempt to square this interpretation of the effect of word "nigger" on the listener with the effect of the same word in the Title VII context. *See NLRB v. Foundry Division of Alcon Industries, Inc.*, 260 F.3d 631.

The Sixth Circuit walked a very delicate path to its decision. The court properly degraded the term "nigger." It made several references to third-party conduct and its apparent lower standard, and finally declared that what was said, "Ervin Wilson, a pro-Union employee standing approximately 10 persons behind him, yelled, "Niger [sic] Shorty [Knight's nickname], I know you're going to vote yes," while inappropriate or objectionable banter was very simply not an *appeal to racial prejudice*, and therefore was not sufficient to destroy laboratory conditions.

It was particularly important for the Board and the Court to look to the legal parameters established under Title VII in this matter. The facts of this situation — egregious racial epithets hurled by third parties at voters while in line to vote —have never been addressed by the Board or this Court. Thus, there is no basis to defer to the Board's expertise in union election issues in this regard. Instead, it is imperative that the Board's approach to this novel factual scenario be influenced by, and be consistent with, the other laws that address the workplace environment.

As fully set forth above, the law of Title VII firmly embraces the notion that the use of the term "nigger" is poison in the work environment. The poisonous effect of these words in the context of determining whether a work environment is hostile cannot be said to have a diminished effect when those same words are hurled at voters while they are standing in line to vote. The Board and this Court have

been careful in providing steadfast protection of the sacrosanct time just prior to casting a ballot. *See General Shoe Corp.*, 77 NLRB 124, 127 (1948). The language injected into this environment is as poisonous in the context of Title VII, and, is equally, if not more, poisonous in the laboratory conditions of a union election.

In sum, the Sixth Circuit's decision creates two irreconcilable bodies of law regarding the effect of racial slurs in the work environment. Repeated racial slurs cannot be said to exacerbate the impact of those slurs and create a hostile environment for employees in the Title VII context, while at the same time have no impact on an employee's ability to exercise a free and unfettered choice in the NLRA election context.

CONCLUSION

For all the foregoing reason, Petitioner respectfully requests that this Court issue a Writ of Certiorari in this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-5062

[Filed August 9, 2001]

National Labor Relations Board,
Petitioner,

v.

Foundry Division of Alcon Industries, Inc.,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board. No. 8-CA-30459.

JUDGES:

Before: JONES and DAUGHTREY, Circuit Judges; ECONOMUS, District Judge. *

* The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

NATHANIEL R. JONES, Circuit Judge. This case is before the Court on the application of Petitioner National Labor Relations Board ("Board" or "NLRB") to enforce a Board order issued against Respondent Foundry Division of Alcon Industries, Inc. ("Company"). The Company has refused to bargain with the Union based on objections to the underlying representation election. This appeal requires us to determine whether, on the facts of this case, the Board properly concluded that the election should not be overturned on the basis of the use of racial epithets. We hold that there was not a deliberate appeal to racial prejudice and will enforce the Board's bargaining order.

I.

On May 22, 1997, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW" or "the Union") filed a representation petition with the NLRB seeking certification as the collective bargaining representative of production and maintenance employees at Foundry Division of Alcon Industries, Inc. Pursuant to a stipulated election agreement, the Board conducted a secret-ballot election on July 11, 1997. Seventy-one out of seventy-five eligible voters cast ballots. Thirty-six votes were cast for the Union and thirty-two were cast against the Union. Three ballots, a number insufficient to affect the outcome, were challenged. The Company filed objections to conduct affecting the results of the election. The Regional Director issued a report recommending that the Board overrule the Company's objections. The Company filed Exceptions to the Regional Director's report, and the NLRB

issued a decision and order directing the Regional Director to conduct a hearing regarding the Company's objections.

A Hearing Officer held a two-day hearing and issued a report recommending that the objections be overruled and that a Certification of Representative issue in favor of the Union. Again, the Company filed Exceptions. A three-member panel of the Board issued a supplemental decision and Certification of Representative adopting the hearing officer's findings and recommendations. The Board agreed with the Hearing Officer that the employees' alleged use of racial epithets as they were waiting in line to vote was not objectionable, but said, "In so finding, we rely solely on the fact that the use of such epithets, in the circumstances present here, did not constitute an appeal to racial prejudice." (J.A. at 279.)

Thereafter, the Union requested to bargain collectively with the Company, and the Company refused. As a result, the Union filed an unfair labor practice charge. The NLRB Regional Director issued a Complaint. The Company filed an answer to the Complaint in which the Company admitted refusing the request to bargain but challenged the validity of the representation election. The General Counsel filed a motion for summary judgment on May 26, 1999, and in response the Board issued an order to show cause why the motion should not be granted. The Company filed a memorandum in opposition to the motion for summary judgment, in which it reasserted its contentions that misconduct destroyed the conditions necessary for an election.

On July 8, 1999, the Board issued a decision and order granting summary judgment and found that the Company had

violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) and (1)). The Board said that the "representation issues raised by Respondent were or could have been litigated in the prior representation proceeding" and that the Company did not offer to produce evidence or allege special circumstances to merit reconsideration. (J.A. at 321.) The Board ordered the Company to bargain upon request from the Union and to post copies of a remedial notice. On January 13, 2000, the Board filed an Application for Enforcement of its order with this Court.

Though other witnesses testified before the Hearing Officer, the testimony of African-American employee Enrico Knight is the most central to the issues we will address in this opinion. Knight testified that he was the second or third person in line to vote and that while he was in line another employee, Ervin Wilson, also African-American, said to him "Niger [sic], Shorty[1], I know you're gonna [sic] vote yes." (J.A. at 206.) (Knight also testified that Wilson may or may not have used the word "nigger.") When asked about the use of racial terms, Knight said that it was just a joke. Further, when asked if other people were using racial terms Knight responded, "At Alcon that's all they do." (J.A. at 206.) He said that in the voting line people were saying things like "Niger [sic], bitch, whore, all that." (J.A. at 207.) He said he could not recall who said these things, "The line was so long, you know, I hear it and I don't hear it, I'm use to hearing it every day from them." (J.A. at 207.) Knight said that African Americans at the Company often used the word "nigger" and

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[1] Knight explained that he is called "Shorty." (J.A. at 204.)

that he did not consider it a racial slur. (J.A. at 226-27.)[2] In fact, later in the hearing Knight testified that he could not remember whether Wilson had used the word "nigger." Knight said, "he might have, I'm not for sure it's been so long. We use it everyday." (J.A. at 229.)

In addition, an employee of the Company's human resource department testified before the Hearing Officer that several years before the vote she had received a few complaints by employees regarding the use of racist terms at the work place. (J.A. at 179-83.)

II.

"The issue before us is whether the Board, in overruling the Company's objections and certifying the Union, acted within the 'wide degree of discretion' entrusted to it by Congress in resolving questions arising during the course of representation proceedings." *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 313 (6th Cir. 1987) (*quoting NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 91 L. Ed. 322, 67 S. Ct. 324 (1946)). As long as the Board's findings of fact are "supported by substantial evidence on the record considered as a whole," we will not disturb them. 29 U.S.C. § 160(e) (2001); *see also NLRB v. Seawin, Inc.*, 248 F.3d 551, 554-55 (6th Cir. 2001). "Substantial evidence consists of such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Kentucky General, Inc. v. NLRB*, 177 F.3d 430, 435 (6th Cir. 1999) (internal quotation omitted). "The Board's reasonable inferences may not be

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[2] Knight testified that the foundry workforce was primarily African-American. (J.A. at 226.)

displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo*." *Tony Scott Trucking*, 821 F.2d at 313 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456 (1951). Moreover, "the Board's conclusions of law must be affirmed if they are based upon a reasonable defensible construction of the Act." *Loral Defense Systems-Akron v. NLRB*, 200 F.3d 436, 447 (6th Cir. 1999); *see also NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 284 (6th Cir. 1998) ("The courts must respect the Board's legal interpretations if reasonable.").

III.

The seminal case in the area of race and union elections is *Sewell Manufacturing Co.*, 138 N.L.R.B. 66 (1962). In that case, during a representation election at plants in Georgia, the employer distributed to its employees various items relating to race including a picture of a white woman dancing with a black man, a picture of a black woman dancing with a white man identified as a union leader, and articles and letters stating that the union donated money to the National Association for the Advancement of Colored People and the Congress of Racial Equality, including a letter explaining that the president of the employer company would vote against the union because of its contributions to these organizations. *Id.* at 66-68. The Board recognized that its function is to,

> conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise

> of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

Id. at 70. In *Sewell* the Board held that an appeal to racial prejudice could prevent reasoned choice. The Board explained:

> We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.
>
> What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.

Id. at 71. The Board further stated, however, that if "a party limits itself to t*ruthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant,

inflammatory appeals, we shall not set aside an election on this ground." *Id.* at 71-72.[3] Applying these rules to the facts of that case, the Board determined that "the Employer's propaganda directed to race exceeded permission limits and so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility." *Id.* at 72.

The Sixth Circuit has applied this rule in several cases. For instance, in *NLRB v. Eurodrive, Inc.*, a union representative told white employees prior to the election that unlike the only black employee the white employees needed the union to protect their jobs. 724 F.2d 556, 557 (6th Cir. 1984). The representative cited as an example a situation involving a white employee who had recently been fired for racial harassment and insisted that the union would get him rehired. *Id.* at 557. The Court considered it necessary to view the statements in the context of the racial tension already existing at the time the alleged statements were made and ultimately refused to enforce the Board's bargaining order. *Id.* at 559, 560. The Court held that the union representative had engaged in a "deliberate attempt to exacerbate racial feelings among the employees prior to the election" and that, under the factual circumstances surrounding the conduct, this "was likely to have had an appreciable affect upon the employees' freedom of choice." *Id.* at 560.

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[3] The Board further explained that "the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him." *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 72 (1962).

In *Carrington South Health Care Center, Inc. v. NLRB*, the Court found that the imagery used in cartoons distributed by the union "[could] be construed at a glance as invoking tokens of slavery and racial oppression, and that the cartoons could therefore be construed as a deliberate exacerbation of racial feelings by irrelevant and inflammatory appeals." 76 F.3d 802, 807 (6th Cir. 1996). In discussing the applicable case law, the Court noted that

> there have been two main lines of cases stemming from *Sewell*. The first is represented by cases in which a prejudicial remark is directed toward a specific person or group. In these cases, the NLRB generally requires a hearing, because there is no question but that an appeal was made to racial prejudice in a manner unrelated to any legitimate campaign theme.

Id. at 805. *Eurodrive* is included in this group. *Id.* "The second line of the *Sewell* progeny comprises cases in which courts generally have not required a hearing, and embraces circumstances in which an union has attributed racial discrimination to the employer, or in which there appears an isolated racial slur." *Id.* at 806. The Court placed the facts of *Carrington* in the first group and held that the Board should have conducted a hearing on the employer's objections. *Id.* at 808.[4]

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[4] In *Carrington*, the employer sought a hearing by the Board on its objections to the election. Thus, the Court had to "determine whether a substantial and material factual issue existed with respect to the [employer's] complaint." 76 F.3d 802, 803 (6th Cir. 1996). In the instant case the Board already conducted a

Before proceeding further, we feel compelled to forthrightly address the offensive language in question. The word "nigger" or "niger" as set out in the record is a racial slur. This is so irrespective of its common usage and without regard for the race of those who use it.[5] No employer should tolerate use of the language that is apparently commonplace at Respondent's workplace; ie., "nigger," "bitch," "whore," etc. It would behoove a prudent employer and union, concerned with the climate in the workplace and recognizing the diversity of today's workforce, to condemn all such language and counsel employees and members against the use of any terms that denigrate and slur. Nonetheless, the facts involved in the instant case do not allow the Court to apply the very logical and appropriate rule set forth in *Sewell*.

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hearing. Nonetheless, the Court's discussion and application of *Sewell* is pertinent and instructive.

[5] That the word "nigger" is a slur is not debatable. The recent edition of the American Heritage Dictionary of the English Language defines "nigger" as follows.

> *Offensive Slang* **1.a.** Used as a disparaging term for a Black person: "*You can only be destroyed by believing that you really are what the white world calls a nigger*" (James Baldwin). **b.** Used as a disparaging term for a member of any dark-skinned people. **2.** Used as a disparaging term for a member of any socially, economically, or politically deprived group of people: "*Gun owners are the new niggers . . . of society*" (John Aquilino).

The American Heritage Dictionary of the English Language (4th ed. 2000).

Contrary to the Company's argument, *Sewell* does not require that the Court set aside the election in this case.[6]

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[6] We recognize that the case at bar is different from the cases discussed above in that a third party made the comments at issue here. When determining whether to set aside an election courts place more weight on misconduct by the employer or the union than on conduct by third parties. Generally, when the conduct of third parties is the basis of an election challenge the appropriate test is "whether the actions of a mere Union 'adherent' were 'sufficiently substantial in nature to create a general environment of fear and reprisal such as to render a free choice of representation impossible . . . .'" *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 n.1 (6th Cir. 1988) (quoting *Hickman Harbor Serv. v. NLRB*, 739 F.2d 214, 220 (6th Cir. 1984). Whereas, when the conduct is attributable to the union or the employer the test is whether the conduct "reasonably tended to interfere with the employee's free and uncoerced choice in the election." *Superior Coatings*, 839 F.2d at 1180 (quoting *Baja's Place*, 268 N.L.R.B. 868 (1984)) (alteration in *Superior Coatings*)). It does not appear that the Sixth Circuit has applied the *Sewell* test to the conduct of a third party. Other circuits have done so, and there has been some disagreement as the appropriate standard. *See e.g.*, *NLRB v. Katz*, 701 F.2d 703, 707 (7th Cir. 1983) (applying following test to remarks by third-party: "whether the inflammatory remarks could have impaired the employees' freedom of choice in the subsequent election"); *Did Bldg. Servs., Inc. v. NLRB*, 915 F.2d 490, 498 (9th Cir. 1990) (rejecting *Katz* standard as too inclusive and instead holding that "an employee's appeal to prejudice must so taint the election atmosphere as to render free choice of representation impossible"); *accord M&M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1572-73 (11th Cir. 1987) (stating test as whether the employee's acts "destroyed the atmosphere necessary to the exercise of a free choice in the representation election") (quoting *NLRB v. Carroll Contracting & Ready Mix, Inc.*, 636 F.2d 111, 113 (5th Cir. 1981)). In the case at bar, however, it is unnecessary for the Court to enter this debate because even assuming that the conduct had been attributable to the Union, the conduct does not satisfy the standard for invalidating the election, as expressed in *Sewell*, *Eurodrive*, and *Carrington*.

Even when we consider "the context in which the statements were made and the total conduct of the person who made the statements," *Eurodrive*, 724 F.2d at 559 (internal citations omitted), we are unable to find anything to suggest that when Ervin Wilson said to Enrique Knight, "Niger [sic], Shorty, I know you're gonna [sic] vote yes," Wilson was trying to appeal to racial prejudices held by Knight or that he was trying to exacerbate pre-existing racial tension. Likewise, although Wilson testified that other employees in the voting line were using the word "nigger" along with words like "bitch" and "whore," there is no evidence that they were doing so in an attempt to garner votes for the union based on racial animosity. In fact, Knight testified that it was just a joke and that this kind of language was used so often at the foundry that he was not even sure whether or not Wilson had actually used the word "nigger" and he could not remember who else was using this language.

Thus, this situation is unlike *Sewell*, in which the employer intentionally attempted to appeal to employees' racial prejudices so that they would reject the union on racial grounds. 138 N.L.R.B. at 66-68. Nor is it like *Eurodrive* in which the union representative reached out to white employees by promising to force the company to rehire a white employee who had been fired for racially harassing a black employee. By doing this, the representative "placed undue emphasis on a racial issue which [he] must have known would exacerbate pre-existing racial tension among the employees prior to the election." *Eurodrive*, 724 F.2d at 559. Similarly, the situation in the instant case is unlike *Carrington*, in which the union distributed materials that contained "images of bondage or violence visited upon racial minorities by a white majority" and thereby depicted

campaign themes such as respect for employees in manner that "could . . . be seen as glaring, graphic appeals to racial prejudice." 76 F.3d at 807.

Although Wilson was encouraging Knight to vote for the union, Wilson's statement does not suggest that members of one race were or could have been "persuaded to vote for or against a union *on the basis of* invidious prejudices they might have against individuals of another race." *Eurodrive,* 724 F.2d at 558 n.4 (emphasis added). Going to the heart of the matter, Knight's statement to Wilson, "Niger [sic] Shorty, I know you're gonna [sic] vote yes," did not create conditions under which it is impossible to determine "the uninhibited desires of the employees" in the election by appealing to racial prejudice. *See Sewell*, 138 N.L.R.B. at 72.

In sum, we conclude that substantial evidence supports the Board's finding that the use of racial epithets, in the circumstances presented here, did not constitute an appeal by union proponents to racial prejudice, and we enforce the Board's order.

In addition, we have carefully considered Respondent's arguments that the law of the case doctrine requires that the election be set aside and that the Board incorrectly rejected its objection based on alleged threats during the representation campaign. We find these arguments to be without merit.

IV.

For the foregoing reasons the Board's petition for enforcement is **GRANTED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5062

[Filed August 9, 2001]

National Labor Relations Board,	)
Petitioner,	)
	)
v.	)
	)
Foundry Division of Alcon Industries, Inc.,	)
Respondent.	)
	)

JUDGES:
Before: JONES and DAUGHTREY, Circuit Judges; ECONOMUS, District Judge.

JUDGMENT

THIS MATTER came before the court upon an application for enforcement of an order against Foundry Division of Alcon Industries, Inc.

UPON FULL REVIEW of the record and the briefs and arguments of counsel, we conclude that the decision of the National Labor Relations Board should be enforced, and accordingly:

IT IS ORDERED that the application for enforcement of the order issued by the National Labor Relations Board in this matter is GRANTED and the Board's bargaining order is ENFORCED.

ENTERED BY THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

00-5062

[Filed December 21, 2001]

National Labor Relations Board, *Petitioner*,	)
v.	)
Foundry Division of Alcon Industries, Inc., *Respondent*.	)

JUDGES:

BEFORE: JONES and DAUGHTREY, Circuit Judges; and ECONOMUS, * District Judge.

* Hon. Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX C

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

[Filed July 8, 1999]

Case 8-CA-30459

Foundry Division of Alcon Industries, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Petitioner,	)
v.	)
National Labor Relations Board, Respondent.	)

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on January 20, 1999, the General Counsel of the National Labor Relations Board issued a complaint on February 22, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the

National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8-RC-15564. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel,* 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 1, 1999, the General Counsel filed a Motion for Summary Judgment. On June 3, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is

properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation with an office and place of business in Cleveland, Ohio, has been engaged in the operation of a foundry. Annually, the Respondent, in conducting its business operations described above, sells and ships from its Cleveland, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held July 11, 1997, the Union was certified on September 16, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees at the Foundry Division of Alcon Industries, Inc., at its facility located at 7990 Baker Avenue, Cleveland, Ohio, including all lead people, CAD operators, quality control inspectors, inspectors, lab technicians, quality sand mill operators, and plant and office cleaning personnel, but excluding all temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since December 8, 1998, the Union has requested the Respondent to bargain and, since December 15, 1998, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after December 15, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962); *Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.,* 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Foundry Division of Alcon Industries, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees at the Foundry Division of Alcon Industries, Inc., at its facility located at 7990 Baker Avenue, Cleveland, Ohio, including all lead people, CAD operators, quality control inspectors, inspectors, lab technicians, quality sand mill operators, and plant and office cleaning personnel, but excluding all temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms

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[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant

provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 8, 1999

/s/_____
Sarah M. Fox, Member

/s/_____
Wilma B. Liebman, Member

/s/_____
J. Robert Brame III, Member

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to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees at our facility located at 7990 Baker Avenue, Cleveland, Ohio, including all lead people, CAD operators, quality control inspectors, inspectors, lab technicians, quality sand mill operators, and plant and office cleaning personnel, but excluding all temporary

employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

FOUNDRY DIVISION OF ALCON INDUSTRIES, INC.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Filed September 16, 1998]

Case 8-RC-15564

The Foundry Division of Alcon Industries, Inc.	)
Employer	)
	)
and	)
	)
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW	)
Petitioner.	)
	)

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 11, 1997, and the hearing officer's report recommending

disposition of them.* The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 36 for and 32 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results. Thereafter, the Employer filed timely objections to the election.

On August 6, 1997, the Regional Director for Region 8 issued a Report on Objections in which he recommended that the Employer's objections be overruled and that a Certification of Representative be issued. On April 15,1998, the Board remanded the case to the Regional Director for a hearing on the Employer's objections.

The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the hearing officer's

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* In the section of the hearing officer's report entitled "Objection No, 1," fifth paragraph, "Peterson" should read "Perkins"; and in the fifteenth paragraph of the same section, "May 22, 1997" should read "May 23, 1997." These inadvertent errors do not affect the results of our decision.

findings and recommendations,[1] and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

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[1] In adopting the hearing officer's recommendation to overrule Employer's Objection 1, we agree with the hearing officer that the employees' alleged use of racial epithets as they were waiting in line to vote was not objectionable. In so finding, we rely solely on the fact that the use of such epithets, in the circumstances present here, did not constitute an appeal to racial prejudice. See *Sewell Mfg. Co.*, 138 NLRB 66 (1962).

Also in regard to Employer's Objection 1, in adopting the hearing officer's finding that Owens' alleged statement to employee Colon, "don't let your kids know that their father's a coward," was not objectionable, Member Brame relies solely on the hearing officers finding that this statement was "not a threat of any kind."

In adopting the hearing officer's recommendation to overrule Employer's Objection 2, Member Brame relies solely on the hearing officer's finding that employee Harding's alleged threat to employee Cathey, upon Cathey's refusal to sign a union authorization card after his return from a three-week disability leave, to the effect that Cathey would not have a job if the Union got in and Cathey took some more time off, did not constitute a threat because it was "illogical and unreasonable" and therefore not coercive. See *Underwriters Laboratories*, 323 NLRB No. 51, slip op. at 3 (Mar. 27, 1997), enfd. ___ F.3d ___ 158 LRRM 2597 (9th Cir. 1998).

All full-time and regular part-time production and maintenance employees at the Foundry Division of Alcon Industries, Inc., at its facility located at 7990 Baker Avenue, Cleveland, Ohio, including all lead people, CAD operators, quality control inspectors, inspectors, lab technicians, quality sand mill operators and plant and office cleaning personnel, but excluding all temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., September 16, 1998.

/s/_____
Sarah M. Fox, Member

/s/_____
Wilma B. Liebman, Member

/s/_____
J. Robert Brame III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION EIGHT

[Filed June 24, 1998]

Case 8-RC-15564

The Foundry Division of Alcon Industries, Inc.	)
Employer	)
	)
and	)
	)
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW	)
Petitioner.	)

HEARING OFFICER'S REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement approved by the Regional Director on June 12, 1997, an election was conducted on July 11, 1997 among employees in the following described unit:

> All full-time and regular part-time production and maintenance employees at the Foundry Division of Alcon Industries, Inc. at its facility located at 7990 Baker Avenue, Cleveland, Ohio including all lead people, CAD operators, quality control inspectors, inspectors, lab technicians, excluding all temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots issued after the election shows that of approximately 75 eligible voters, 71 cast ballots, of which 36 were cast for, and 32 against, the Petitioner. There were 3 challenged ballots, a number which is not sufficient to affect the results of the election.

On July 18, 1997, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served on the Employer.

On August 6, 1997, the Regional Director issued his Report on Objections, recommending that the Objections be overruled and that a Certification of Representative be issued in favor of the Petitioner.

On April 15, 1998, the Board issued its Decision and Order Directing Hearing, remanding the matter to the Regional Director and ordering that a hearing be held to resolve the issues raised by Employer Objections 1,2, and 3 before a duty-designated hearing officer.

On April 22, 1998, the Regional Director issued a Notice of Hearing on Objections, ordering that a hearing be held to resolve the issues raised by Employer Objections Nos. 1,2,and 3.

On May 8 and June 12, 1998, a Hearing was held before me pursuant to that Order. All parties with a continuing interest in these proceedings appeared and were given an opportunity to present witnesses and evidence bearing on the issues raised by the objections. Based on the testimony developed in that proceeding, on my observation of the witnesses and their demeanor, and on the documentary evidence, I make the following findings, conclusions, and recommendations:

OBJECTION NO. 1

In this Objection, the Employer asserts that the Petitioner, through its "agents, and/or known union supporters and adherents, and/or employees and third parties" threatened the eligible voters with physical harm if they did not "sign cards and/or support the Petitioner" including but not limited to, threats made in the polling area during the election in the presence of eligible voters.

To support this objection, the Employer presented witnesses Rafael Colon, John Blaha, and Enrico Knight.

Colon testified that he was asked to sign a Union Authorization Card by fellow employee Jeffrey Owens while he and another, unidentified employee were in the office about three weeks before the election. According to Colon, Owens asked him to sign a card for the Petitioner; when he

told them that he wanted to talk it over with his wife, Owens allegedly said: "don't let your kids know that their father's a coward", and Colon walked away. (T., pgs. 14-15) In addition, Colon also testified that the formerly cordial working relationship he had with Owens deteriorated after this incident, and that they "almost got into a fight" (T., pg. 17) about two weeks later. As Colon related the events that lead up to the altercation with Owens, Colon made a statement to a fellow employee ("Kerry Holiness", according to the testimony), which Owens interpreted as a criticism of his work performance. As a result, Colon testified, Owens allegedly threatened to "beat the hell out of me with a piece of wood behind the racks." (T., pg. 21). The incident resulted in suspensions without pay for each employee: Owens for five days, Colon for Three. During cross-examination, Colon testified that Owens asked him to sign a "small card" (smaller than 8 ½ by 11), and that they were both employees of the Employer at the time of these incidents. In addition, the Petitioner introduced both affidavits executed by Colon as a part of the investigation of this matter, Union Exhibit 1 being an affidavit prepared by a Board Agent, and Union Exhibit 2 being an affidavit prepared by an attorney for the Employer. While Union Exhibits 1 and 2 both relate events basically as testified to by Colon, Union Exhibit 1 goes on to specify that Owens said nothing to Colon about the Union or the organizing during the incident that lead to their suspensions, and that he had been having problems with Owens for "...a long time." (Un. 2, page 2, lines 7-8).

Blaha testified that he was asked to sign a card by fellow employee Ronnie Perkins in the middle of April, 1997[1], a time well outside the critical period herein[2].

Knight, employed by the Employer from January 2, 1994 until August 11, 1997, testified that he was standing in line to vote on July 11, 1997 when one employee, Ervin Wilson, said to him: "Niger[3] Shorty, I know you're gonna vote yes." (T., pg. 133). He also testified that the use of language like that set forth above and of terms like "bitch" and "whore" were being used in the line of employees waiting to vote. Finally, Knight testified that several

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[1] Blaha, who may have had another conversation with someone else regarding the organizing, refused to reveal the name of that person. I sustained the Petitioner objection to the Employer's attempt to present the content of that conversation without the name of the individual who allegedly participated in the conversation with Blaha. It is the Employer's burden, as the objecting party, to support its assertions with testimony and other evidence. If the Employer is unable to sustain that burden due to the reluctance of its own witnesses, I can do no more than instruct the witness regarding the consequences of that refusal to testify. In this case, I did that, with mixed results. I was unable to convince Blaha to reveal the name, so I did not permit him to testify concerning the incident. I was more successful with Cathey.

[2] As pointed out by the Regional Director in footnote 1 of his Report on Objections, the petition in this matter was filed on May 23, 1997. Thus I can only consider the alleged interference which occurred during the critical period which began on and includes the date of the filing of the petition and extends through the day of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

[3] This spelling is from the transcript. I believe the correct spelling of this usually-offensive and racially sensitive term is "nigger".

employees, including Wilson, Samuel Ivory, "Dan" and Ronnie Perkins, asked him how he voted, either after he came out of the polling place, when he returned to his work area, or, in the case of Peterson, the next day. On cross-examination, Knight testified that the work force of the Employer was primarily African-American at that time, that the use of those terms among the African-American employees at the Employer was "routine" (T., pg. 153) and that he did not consider the use of those terms in this context to be a racial slur.(T., pg. 154). In addition, Knight testified that Ervin Wilson is an African-American, that he "might" have used the "N-word" when he said "Shorty, I know you're gonna vote yes", and that the reason that he cannot remember exactly what was said is that the employees use that term among themselves every day, so much so that it is not of any significance to him. (T., pg. 156). Finally, Knight testified that the terms "bitch" and "whore" are also used in the shop "every day", (T. pg. 161) and that the men in the shop routinely referred to each other in those terms when he worked there.

Petitioner presented witnesses Robert Nece, Jeffrey Owens, Eric Harding and Ronald Perkins regarding this objection.

Nece, an International Organizer for the Petitioner, testified that employee Johnny Lawson was the key contact at the Employer and that the Petitioner used documents measuring 8 ½ by 14 inches called "We are the Union Authorization Petitions", (Union Exhibit 4) not cards, to obtain the signatures of employees who supported the Petitioner. According to Nece, all of the signatures obtained for that purpose were signed on May 2 and May 4, 1997, and

the Petitioner held no other meetings with employees during the drive, only sending one mailing to employees on the election eligibility list prior to the election. Finally, Nece testified that the professional staff of the International Union ran the organizing drive, and that the one person the Petitioner designated as its representative for the purpose of serving as observer at the election, Ronnie Perkins, acted on his own and challenged the vote of an individual who he was instructed by Nece not to challenge. On cross-examination, Nece testified that he only spoke with Lawson and Perkins prior to the election, that he did not recall speaking to Harding or Owens, and that his conversations with Perkins was restricted to the instructions regarding his service as election observer just prior to the election. Finally, Nece testified that the Petitioner did not have anything that could be called an "in-plant organizing committee" with regular committee meetings and any kind of formal structure, just a "couple key contact people" that were used to stay in touch with the staff. (T., pg. 78).

Owens testified without contradiction that his last day of employment with the Employer was May 12, 1997.

Harding, an employee for five years, testified that he was standing in line, waiting to vote, on the day of the election, and that he did not hear any racial slurs or observe any coercive conduct throughout the time he was in line to vote. Finally, Harding testified that the Employer workforce is 80% African-American, that the use of the "N-word" among African-Americans in conversation is routine in the shop, and that, in that context, the use of that word is "Friend-friendly, you know, we do it, it doesn't bother us, you know." (T., pg. 89) at the plant.

Perkins, employed for 21 years, testified that he attended both of the meetings held by the Petitioner for employees at the Burger King near the plant in early May, 1997. According to his testimony, they were held on May 1 and 2, 1997, he took one petition back to the plant with him to get signatures of employees who wanted to support the organizing, and he returned the petition, page four of the Union Exhibit 4, to the Petitioner on May 4, 1997. Perkins also testified that the racial composition of the employees of the Employer is 70-80% African-American, that they used the "N-word" every day with each other, and that he does not see it as a racial slur when used in that way. Perkins, who served as the Petitioner election observer, testified that he did not hear any racial slurs being used by employees who were waiting in line to vote, that he did not hear any threats or observe any coercive activity in the line, and that he ignored the instructions of Nece and challenged the vote of an employee who he had been instructed to allow to cast her ballot. On cross-examination, Perkins continued to insist that African-American employees use of the "N-word" with each other "all the time", that "we speak that way", and that "this is the way we talk". (T., pgs. 104-105).

Mullins, the Employer Human Resources Director and Controller, was called as a rebuttal witness. She testified that two African-American employees complained about the use of the "N-word" in the shop by other African-Americans about three to three and one-half years ago.

Initially, I note that there is no credible evidence on this record to establish that Owens, Ivory, Wilson, Harding or Perkins were agents of the Petitioner for any purpose beyond the solicitation of cards, or, in the case of Perkins, his

service as election observer[4]. Thus, the Employer has offered no evidence that any of these employees were authorized by the Petitioner to speak for the Petitioner during the campaign, played any role in the presentation of the Petitioner's campaign positions, or participated in any formal way in what the evidence clearly discloses was a very minimal election campaign by the Petitioner. As pointed out by the Regional Director in his Report on Objections, alleged threats by card solicitors cannot reasonably be viewed within the scope of their authority and thus are not attributable to the Petitioner. *BCF Inc. d/b/a Shawnee Manor*, 321 NLRB 1320 (1996). I therefore find and conclude that none of the named employees were agents of the Petitioner during the critical period and that their alleged conduct cannot be attributed to the Petitioner.

Such conduct is to be evaluated, then, under the third party standard, as enunciated in *Westwood Horizons Hotel*, 270 NLRB 802 (1984). That case holds that the conduct of third parties must be so aggravated that a general atmosphere of fear and reprisal is created, such that it interferes with the right of employees to a free and uninhibited choice in the election and renders a free election impossible.

The conduct alleged to heave occurred herein, even if it occurred exactly as related by the Employer witnesses, does not rise to the level that allows me to conclude that the Westwood standard has been met. Thus, the testimony of

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[4] Obviously, in this capacity, Perkins continued to assert his independence from the Petitioner, challenging the vote of an employee who the Petitioner wanted to vote. Based on this fact alone, he is obviously not an agent of the Petitioner.

Colon established only that one employee, while soliciting his support for the Petitioner, exhorted him "don't let your kids know that their father's a coward" after he said he wanted to talk the matter over with his wife. This is hardly more that an attempt to appeal to Colon's sense of shame or masculinity; it is certainly not a threat of any kind, and does not rise to the level of violence and coercion necessary for me to conclude that an atmosphere of fear and reprisal could thereby be created.

However, there is another, more important consideration: whether this alleged threat occurred at all. In evaluating the testimony of Colon, I am struck by some glaring inconsistencies. First, he testified that he was asked to sign a "card" while the Petitioner has provided conclusive and credible evidence that it did not use cards during this campaign, preferring instead the petition format (Union Exhibit 4). Even mMarch 4, 2002ore persuasive is the evidence that all of the solicitations occurred before the Petition in this matter was filed on May 22, 1997, and thus outside the critical period. Apart from the obvious evidence contained in the testimony of Harding and Perkins, who testified without contradiction that they returned the only petitions received from the Petitioner representative on May 2 and 4, 1997, there is the unrebutted testimony from Owens that his last day of work was May 12, 1997, which establishes that whatever he said to Colon and whatever the reason for the altercation between them, it all occurred outside the critical period and is, thus, not objectionable conduct. Therefore, based on the testimony of Owens, Harding and Perkins, which I credit[5], I find and conclude that the portion

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[5] The testimony of these employees impressed me, not only

of Employer's Objection Number 1 regarding the alleged threats made by Owens and Harding while they were soliciting signatures from employees is without merit and I shall recommend that it be overruled.

Finally, we have the testimony of Knight, who the Employer would have me conclude was coerced and restrained in his choice of representative because words and epithets that he asserts he heard every day in the shop were uttered by fellow employees as they were all waiting in line to vote. Not only did Knight, whom I have already credited, testify that this language was common and usual in the shop, but several African-American co-workers, whose testimony I have also credited, testified that the use of these words and epithets among themselves is normal, everyday speech, such that they do not even pay any attention to it, much less allow it to intimidate them, influence them, or offend them.

In *Shawnee Manor, supra*, the Board considered an Employer allegation that alleged racial remarks, uttered by a pro union employee, should be the basis for overturning the

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with their candor and straightforward manner of testifying (Owens, Harding and Perkins), but also with their obvious need, when testifying concerning the allegations involving racial epithets, to ensure that they were not misunderstood or mislead by the questions of counsel regarding the way the employees normally speak to each other in the shop. (Harding, Perkins and Knight). The only testimony offered by the Employer on this subject, that there were two complaints from employees about this type of language lodged three and one-half years ago, does not establish that the language is uncommon, unusual, or that its use is anything other than that testified to by these employees. The testimony of Owens is not contradicted on this record.

election. In that decision, the Board found that the remarks[6] did not seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals. Therefore, using an analysis of the evidence as set forth in *Sewell Mfg. Co.*, 138 NLRB 66 (1962), the Board concluded that the remarks "did not so inflame and taint the atmosphere in which the election was held that "a reasoned basis for choosing or rejecting a bargaining representative was an impossibility" citing *Sewell*, at 72.

The allegations herein do not rise to the level of those in *Shawnee Manor*, much less those in *Sewell*. In those cases, there was evidence that alleged representatives of one of the parties attempted to influence the results of the election by appealing to the racial prejudices of a segment of employees. Here, the interpretation most favorable to the Employer objection only results in a conclusion that the employees in this plant spoke to each other in their normal manner while there were waiting in line to vote. There are no allegations, much less evidence, that anyone in this election, whether a party or an employee, made any kind of appeal to racial prejudice which would justify the holding of another election. See *Benjamin Coal Co.*, 294 NLRB 572, 573 (1989).

Therefore, relying on the credited testimony of Knight, Owens, Harding and Perkins, I find that the use of these normally-offensive words in the line by employees who

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[6] The Employer presented evidence that an employee told other employees that "she thought some of the Employer's nurses treated black employees worse than white employees". In addition, there were other, similar allegations about remarks made outside the critical period and rumors that the election was a "black-white" issue.

were waiting to vote cannot be considered objectionable conduct. Therefore, I conclude that Employer's Objection Number 1 is without merit and I shall recommend that it be overruled.

OBJECTION NUMBER 2

In this objection, the Employer alleges that the Petitioner, by and through its "agents and/or known union supporters and adherents, and/or employees and third parties", told eligible voters that the company would terminate employees who signed authorization cards if the Petitioner lost the election.

The Employer presented testimony from former employee Patrick L. Cathey, Jr. in support of this objection.

Cathey, last employed in September, 1997, worked for the Employer for sixteen and one-half years. He testified that he was approached by employees Johnny Lawson, Ronnie Perkins, and Eric Harding on the same day in May, June or July, 1997 just after he returned from a three week disability leave. According to Cathey, Lawson asked him to sign a card, and he told him he "did not want to sign one at this time" (T.,pg. 49-50). Later that day, Perkins asked him why he didn't sign a card, and he replied that he wanted "more information about it." (T., pg. 50) Still later that day, after lunch, Harding asked why he wasn't voting for the union, to which he replied that he wanted more information about it. After that response, Harding allegedly told him that, if he did not support the Union, he would not have a job if he "...took some more time off..." (T., pg. 52). On cross examination, Cathey testified that the card he was asked to sign was a

yellow card, about the size of an index card. In addition, Cathey admitted that his affidavit, executed immediately after the election and introduced as Union Exhibit 3, is "accurate" where it relates the comment by Harding as: "You take another two months off after the Union gets in and see if you still have a job" (T., pg. 54-55).

Harding testified that he asked Cathey if he wanted to sign a petition (Union Exhibit 4) for the Union sometime in late May, June and early July, 1997, that Cathey said "no", and that nothing else was said between them. After cross-examination, Harding was able to testify, noting the date on Union Exhibit 4, that he turned it in to the Petitioner on May 2, 1997, thus establishing that the solicitation of Cathey must have occurred on or prior to that date. On cross-examination, Harding explained that he received the petition for employee signatures from International Representative Angelo Vasi, and that Vasi instructed him to ask interested employees to sign it if they wanted to "have a vote for a union at the shop."(T., pg. 90).

The comment attributed to Harding by Cathey, while it sounds like a threat, cannot be considered one because, as the Board has held, even statements made by acknowledged agents of a union which threaten loss of job are not objectionable because they are "inherently illogical and unreasonable". *Underwriters Laboratories, Inc.*, 323 NLRB No. 51 (1997). As I have already concluded that the evidence does not support a finding that Harding was an agent of the Petitioner, this conduct does not provide any basis for a conclusion that the statement is a threat of any kind.

The credited the testimony of Harding establishes that this incident, if it occurred at all, took place well before the beginning of the critical period in this matter, when the employees were soliciting signatures on petitions to show support for the Petitioner from May 1 to May 4, 1997. In addition, Harding was not an agent of the Petitioner for any purpose other than the solicitation of signatures on the petition. Finally, I have already concluded, relying on *Underwriters, supra*, that the alleged statement by Harding even if it was uttered exactly as related by Cathey within the critical period, is not a threat.

Therefore, because I find that the statement is not a threat, was uttered outside the critical period by an employee who is not an agent of the Petitioner, I conclude that Employer's Objection Number 2 is without merit, is unsupported by credited testimony and I shall recommend that it be overruled.

OBJECTION NUMBER 3

In this Objection, the Employer alleges, as a "catch-all" objection, that the Petitioner interfered with the employees' rights to a free and fair election.

In support of this objection, the petitioner offered the testimony, already considered above, of Colon, Blaha, and Knight. The Petitioner responded with testimony from all of its witnesses.

I have already credited the testimony of Knight and of witnesses from the Petitioner which establish that, even given the closeness of the vote herein, the cumulative effect of these

allegations is insufficient to establish that any objectionable conduct occurred during the critical period in this matter. Thus, it is obvious from the testimony and the documentary evidence that none of the incidents raised by the Employer have any merit, nor did they occur in the manner alleged in the objections.

In the one area where the Employer might have sustained an objection, its allegation that racial epithets were used by agents of the Petitioner or by third parties in an attempt to enflame racial animosities, thereby creating an atmosphere which rendered a free election impossible, there is no evidence that this conduct was unusual in this plant. Thus, there is no credible testimony to establish that any employee considered that the language used by employees in line, some of whom supported the Petitioner and some who did not, was anything offensive, coercive, or even out of character from the type of speech employed by everyone in the shop on a daily basis. To find that such innocuous speech, at least in this context, justifies the overturning of election results does not make any sense, nor is it in accordance with the applicable precedent.

Therefore, I shall also recommend that Employer's Objection Number 3 be overruled.

CONCLUSIONS AND RECOMMENDATIONS

I conclude that Employer Objections Number 1,2, and 3 are without merit. I recommend that they be overruled and that a Certification of Representative issue in favor of International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, (UAW),

In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board in Washington, D.C. an original and seven (7) copies of the exceptions to this Report within fourteen (14) days of the date of issuance. Immediately upon the filing of such exceptions, the party filing same shall immediately serve a copy thereof on each of the other parties to this proceeding and upon the Regional Director. If no exceptions are filed thereto, the Board may, upon the expiration of the period of filing such exceptions adopt the recommendation of the hearing officer or make other disposition of the case.

Dated at Cleveland, Ohio this 24th day of June, 1998.

/s/_____
Randall A. Malloy
Hearing Officer
Region Eight
NLRB

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WAIVER

IN THE MATTER OF
The Foundry Division of Alcon Industries, Inc
(Name of Case)

8-RC-15564
(Number of Case)

PURSUANT TO SECTION 102.67 AND 102.69 OF THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, THE UNDERSIGNED PARTY WAIVES ITS RIGHT TO REQUEST REVIEW OF OR FILE EXCEPTIONS TO THE REGIONAL DIRECTOR'S AND/OR HEARING OFFICER'S

Hearing Officer's Report on Objection IN THE ABOVE-
(Name of document or applicable documents)

CAPTIONED MATTER June 24, 1998.

The Foundry Division
of Alcon Industries, Inc.
(Name of Party - Employer)

By /s/_____
(Name of Representative)

_____
(Title)
Date_____

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[Filed April 15, 1998]

Case 8-RC-15564

The Foundry Division of Alcon Industries, Inc.	)
Employer	)
	)
and	)
	)
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW	)
Petitioner.	)
	)

DECISION AND ORDER DIRECTING HEARING

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on July 11, 1997, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The

tally of ballots shows 36 for and 32 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and finds that the Employer's Objections 1, 2, and 3 raise substantial and material issues which can best be resolved after a hearing.[1]

ORDER DIRECTING HEARING

IT IS ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the Employer's Objections 1, 2, and 3.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within the time prescribed by the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board in Washington, D.C., eight copies of

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[1] We disagree with our dissenting colleague's conclusion that a remand is not appropriate here. In this regard, although our dissenting colleague asserts that he "would adopt the Regional Director's recommendations to overrule the Employer's objections," he can only do so, as his dissent makes clear, by resolving at this stage of the proceedings several issues which the Regional Director failed to address or to resolve prior to making his recommendations. In these circumstances, we find that a remand of the case for resolution of these issues by the Regional Director after a hearing is necessary.

exceptions thereto. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER ORDERED that the above-entitled matter is remanded to the Regional Director for Region 8 for the purpose of arranging such hearing.

Dated, Washington, D.C., April 15,1998.

/s/_____
Sarah M. Fox, Member

/s/_____
J. Robert Brame III, Member

(SEAL)

NATIONAL LABOR
RELATIONS BOARD

Chairman Gould, dissenting.

Contrary to my colleagues, I would not remand this case for an evidentiary hearing because I find that the Regional Director, after an investigation of the alleged misconduct, correctly found that the Employer did not establish a prima facie case in support of its objections[1]. In this regard, although the Employer contends that there was a "pattern of misconduct" here, it bases this contention on only four isolated incidents set out in the affidavits of Employees A, B, C, and D. Even assuming that the incidents set out in the affidavits of Employees A, B, and D actually occurred as alleged. I agree with the Regional Director that they fail to raise substantial and material factual issues that would require a hearing. As to the incident set out in the affidavit of Employee C, even assuming such an incident occurred after the filing of the petition and therefore within the critical period, I would find that the evidence contained in Employee C's affidavit did not raise substantial and material factual

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[1] The burden is on the objecting party, here the Employer, to come forward with evidence that establishes a prima facie case in support of its objections. To satisfy this burden, the objecting party must "present evidence that raises substantial and material factual issues. In the absence of such evidence, [the Board] cannot conclude that the Regional Director's decision to deny a hearing was unreasonable." *Park Chevrolet-Geo,* 308 NLRB 1010 n. 1 (1992).

In my view, the Employer has failed to present any evidence that would establish a prima facie case in support of its objections and has therefore simply not raised "substantial and material factual issues" that need to be addressed at a hearing. Therefore, contrary to my colleagues, I would not remand this case for hearing. Thus, not only is a remand unnecessary here, but it will only further delay the processing of this election case and unnecessarily waste the Board's limited resources.

issues that would warrant a hearing[2]. Finally, although the Employer contends that the Regional Director failed to consider the cumulative effect of these incidents in dismissing Objection 3, the Employer's "catch-all" objection, I find that the Regional Director did so, in effect, when, having found no merit to Objections 1 and 2, he then found that the Employer had submitted no evidence in support of Objection 3.[3] For all these reasons, I would not remand this case for a hearing, but would adopt the Regional Director's recommendations to overrule the Employer's objections and to certify the Union as the exclusive collective-bargaining representative of the unit employees.

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[2] Employee C alleged that "when the Union's supporters were collecting cards," a fellow employee told him that if he didn't support the Union, and the Union got in, they wouldn't let Employee C cross any picket lines and that if he tried, "they (the Union pickets) 'would be out there with baseball bats.'" Evaluating this alleged threat under the third-party standard set out in *Westwood Horizons Hotel*, 270 NLRB 802,803 (1984), I would find that it was not so aggravated as to create a general atmosphere of fear and reprisal that would render a free election impossible. In reaching this conclusion. I note that this was an isolated threat which occurred early in the campaign and was not renewed, and that there is no evidence that it was disseminated to other employees. See, e.g., *Dart Container*, 277 NLRB 1369, 1371-1372 (1985) (Board found that a local union supporter's statement to an employee that "We'll put you in the hospital" if the employee did not want to support the union or go on strike on behalf of the union "was not so severe as to have intimidated the free choice of employees."

[3] Even considering these four incidents together, I find that their cumulative effect on unit employees was not sufficient to support a finding that an atmosphere of fear and coercion was created. See *Windsor House C & D*, 309 NLRB 693, 696 (1992).

Dated, Washington, D.C., April 15, 1998.

/s/_____
William B. Gould IV, Chairman
(SEAL) NATIONAL LABOR RELATIONS BOARD

Supreme Court, U.S.
FILED
APR 18 2002
OFFICE OF THE CLERK

No. 01-1415

In the Supreme Court of the United States

FOUNDRY DIVISION OF ALCON INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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Petitioner Foundry Division of Alcon Industries, Inc. files this supplemental brief in support of its Petition for Writ of Certiorari to call attention to the applicability to this matter of this Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, Case No. 00-1595, 122 S.Ct. 1275 (March 27, 2002).

As is fully detailed in Alcon's Petition, this case involves the interplay between the National Labor Relations Act ("NLRA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). The principle dispute between the parties concerns the extent to which the Board is required to take racial discrimination laws and standards into account in determining the outcome of a contested representation election.

Alcon has argued in its Petition that the Sixth Circuit and the Board completely failed to follow this Court's previous guidance that the Board must consider other statutory schemes in enforcing the NLRA. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 46-47 (1942). Specifically, the Sixth Circuit and the Board determined the effect of racial epithets on employees in the polling area, with absolutely no reference to the standards for determining the effect of racial epithets that have been developed under Title VII.

This failure to consider the state of the law under Title VII has created two disparate bodies of law on the effect of the racial epithets in the workplace. The Sixth Circuit and the Board found the use of the word "nigger" when hurled toward African-Americans while waiting in line to vote had a lesser effect on African-Americans standing in line to vote, because the record reflected that African-American employees often use the word "nigger" toward one another. This

holding is directly contrary to the state of the law developed under Title VII, in which the effect of the frequent use of this horrid racial epithet is compounded, rather than diminished, by its repeated use.

In *Hoffman Plastic* this Court returned to the issue of the Board's obligation to consider other statutory schemes, that was first addressed in *Southern Steamship*. This Court refused to condone the Board's complete failure to even consider the tension between the Immigration Reform and Control Act of 1986 ("IRCA"), and the remedial provisions of the NLRA. The *Hoffman Plastic* Court held, "[t]he *Southern S.S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Hoffman Plastic*, at 9.

In so holding, this Court noted "we have accordingly never deferred to the Board's remedial preferences when such preferences potentially trench upon federal statutes and policies unrelated to the NLRA" and that an order by the Board that implicates federal statutes or policies administered by other federal agencies is "a 'most delicate area' in which the Board must 'be particularly careful in its choice of remedy.'" Id. at 5, 7-8 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962)).

In this case, as in *Hoffman Plastic*, the Board and the Sixth Circuit have completely ignored the tensions between the dictates of Title VII, that the frequent use of the term "nigger" alters the working conditions of employees, with the Board's interpretation of the NLRA, that the use of the same term in combination with a request for a vote while employees are waiting in line to vote is insufficient to alter the

"laboratory conditions" necessary for a free and fair representation election.

The *Hoffman Plastic* Court also rejected the Board's argument that the employer would get off "scot-free" if the Board did not have authority to award back pay to illegal immigrants in compensation for violations of the NLRA. *Hoffman Plastic*, at 14. This Court noted that there were other significant sanctions that were levied against Hoffman Plastic for their violation. *Id.* The Board, as affirmed by the Sixth Circuit, has made the same argument here, claiming that an employer could intentionally tolerate the use of racist language in an attempt to undermine an election. Any employer would be foolish to take such an approach, as the racist language could very well undermine an election result that is favorable to it, as well as subject the company to the full range of remedies available for racial harassment under Title VII. Further, it is the Board's responsibility to police the polling area to ensure that laboratory conditions are present. Pursuant to Board procedure neither the employer nor the Union is permitted in the polling area while ballots are being cast.

In sum, the *Hoffman Plastic* Court directed the Board to take into account other statutory schemes when fulfilling its responsibilities under the NLRA. Herein, the Board and the Sixth Circuit completely failed to consider the competing interests of Title VII. Petitioner respectfully requests that its Petition for Writ of Certiorari be granted and that the Sixth Circuit's decision be summarily vacated and remanded to the Sixth Circuit for reconsideration in light of this Court's *Hoffman Plastic* decision.

Respectfully submitted,

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